Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–73 OF 1996
KC VOHRAH J
28 SEPTEMBER 1996

Constitutional Law *— Jurisdiction — High Court — Jurisdiction of High Court to question order made in respect of matter which syariah court has jurisdiction — Whether High Court could review or question the validity of a subsisting order made by a syariah court — Whether High Court could go behind the syariah court order — Federal Constitution art 121(1A)*

Islamic Law *— Jurisdiction — Syariah Court — Temporary order for care and custody of child — Whether syariah court in granting the order was a court of competent jurisdiction — Whether syariah court order could be subject to habeas corpus in a civil court — Federal Constitution art 121(1A)*

Administrative Law *— Remedies — Habeas corpus — Alleged illegal detention in private custody — Syariah court had granted order for care and custody of child — Whether High Court could grant habeas corpus contrary to order of syariah court — Whether High Court had jurisdiction to entertain habeas corpus application in this case — Federal Constitution art 121(1A)*

The applicant applied under s 365(1)(b) of the Criminal Procedure Code (FMS Cap 6) ('the Code') to the High Court for directions of the nature of habeas corpus for a child ('the child'), who was alleged to be illegally detained in private custody by the two respondents, to be set at liberty. The applicant in her affidavit disclosed that there was a temporary order ('the order'), made by the Kuala Lumpur Syariah High Court on 15 August 1996, to the effect that the child be placed under the care and control of the second respondent at the first repondent's residence until the disposal of the case. Counsel for the respondents raised a preliminary objection relating to the jurisdiction of the High Court and submitted that the court had no jurisdiction to entertain the matter because the it had no jurisdiction under art 121(1A) of the Federal Constitution ('the Constitution') 'in respect of any matter within the jurisdiction of the syariah courts'. Counsel for the applicant conceded the effect of art 121(1A) but further argued that this court should consider that the child was illegally detained on 16 August 1996 and that the order of the Syariah High Court had no effect. He submitted that this was because the child was kidnapped by the first respondent on 16 August and that although the order of the Syariah High Court gave custody of the child to the second respondent, the order was not served on the applicant before the child was taken away and therefore the order had no effect because the kidnapping had vitiated the order. Counsel for the applicant was of the view that if any of the steps leading to the 'detention' of the subject was not followed, then this court must

interfere. He argued that therefore the custody of the child on 16 August was unlawful.

Held, dismissing the application:

The High Court could not, in a habeas corpus application under s 365 of the Code, review or question the validity of a subsisting order made by a syariah court which was a court of competent jurisdiction. And in any event, the High Court by virtue of art 121(1A) of the Constitution had no jurisdiction to question an order made in respect of a matter where the Syariah High Court, a creature of a written law, had jurisdiction given to it under a written law. This court would have to accept the Syariah High Court order as a valid order. This court could not go behind the order and consequently it had to accept that the custody of the child with the second respondent in the house of the first respondent was not illegal. The sole issue being whether the child was illegally detained and, that question having been answered in the negative, therefore the habeas corpus application could not be employed as a means of securing judicial determination of any peripheral issue outside the alleged illegal detention (see pp 542H–I and 543A–B); *Gurdit Singh (Petitioner)* [1933] MLJ 224, *Janardan Reddy & Ors v State of Hyderabad & Ors* [1951] SCR 344, *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & Satu lagi* [1991] 2 MLJ 244, *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793 and *Lim Chan Seng lwn Pengarah Agama Islam Pulau Pinang & Satu lagi* [1996] 3 CLJ 231 followed.

Obiter:

In this case, the child was in private custody. He was not being detained by a statutory authority under any statute. As no such statute was applicable, there was no issue of any statutory requirement having been breached. As to the effect of the order that the applicant alleged was not served on the day the child was taken away by the first respondent, that was a matter of law that could only be dealt with under the Administration of Islamic Law (Federal Territories) Act 1993 or rules made thereunder, and not by this civil court (see p 544B–C); *Reverend Thomas Pelham Dale* (1881) 6 QBD 376, *Re Tan Boon Liat* [1967] 2 MLJ 108, *Koh Yoke Khoon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45 and *Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor* [1988] 2 MLJ 638 distinguished.

[Bahasa Malaysia summary

Pemohon memohon di bawah s 365(1)(b) Kanun Acara Jenayah (NMB Bab 6) ('Kanun tersebut') kepada Mahkamah Tinggi untuk arahan mengenai jenis habeas corpus bagi seorang kanak-kanak ('si anak'), yang dikatakan ditahan dengan menyalahi undang-undang dalam jagaan persendirian oleh kedua-dua penentang, agar

dibebaskan. Pemohon dalam afidavitnya mendedahkan bahawa terdapat suatu perintah sementara ('perintah tersebut'), yang dibuat oleh Mahkamah Syariah Kuala Lumpur pada 15 Ogos 1996, dengan keputusan bahawa si anak diletakkan di bawah jagaan dan kawalan penentang kedua di kediaman penentang pertama sehingga penyelesaian kes. Peguam penentang-penentang membangkitkan bantahan permulaan berhubung dengan bidang kuasa Mahkamah Tinggi dan berhujah bahawa mahkamah tidak mempunyai bidang kuasa untuk melayan perkara itu sebab ia tidak mempunyai bidang kuasa di bawah perkara 121(1A) Perlembagaan Persekutuan ('Perlembagaan') 'berkenaan dengan apa-apa perkara dalam bidang kuasa mahkamah syariah'. Peguam pemohon bersetuju dengan kesan perkara 121(1A) tetapi selanjutnya berhujah bahawa mahkamah ini harus mempertimbangkan bahawa si anak ditahan dengan menyalahi undang-undang pada 16 Ogos 1996 dan bahawa perintah Mahkamah Tinggi Syariah tidak mempunyai kesan. Beliau berhujah bahawa ini adalah kerana si anak telah diculik oleh penentang pertama pada 16 Ogos dan bahawa walaupun perintah Mahkamah Tinggi Syariah memberi jagaan si anak kepada penentang kedua, perintah itu tidak disampaikan ke atas pemohon sebelum si anak diambil dan dengan itu perintah itu tidak mempunyai kesan sebab culikan telah menjadikan perintah itu tidak sah. Peguam pemohon berpandangan bahawa jika sebarang langkah yang membawa kepada 'tahanan' subjek tidak diikut, maka mahkamah ini mesti campur tangan. Beliau berhujah bahawa dengan itu jagaan si anak pada 16 Ogos adalah menyalahi undang-undang.

Diputuskan, menolak permohonan:

Dalam suatu permohonan habeas corpus di bawah s 365 Kanun tersebut, Mahkamah Tinggi tidak boleh mengkaji semula atau mempersoalkan kesahan suatu perintah berkuatkuasa yang dibuat oleh sebuah mahkamah syariah yang merupakan mahkamah yang mempunyai bidang kuasa kompeten. Dan dalam apa keadaan pun, melalui perkara 121(1A) Perlembagaan Mahkamah Tinggi tidak mempunyai apa-apa bidang kuasa untuk mempersoalkan suatu perintah yang dibuat berhubung dengan perkara di mana Mahkamah Tinggi Syariah, suatu rekaan undang-undang bertulis, mempunyai bidang kuasa yang diberikannya di bawah undang-undang bertulis. Mahkamah ini harus menerima perintah Mahkamah Tinggi Syariah sebagai suatu perintah yang sah. Mahkamah ini tidak boleh mengingkari perintah dan lantaran itu ia mesti menerima bahawa jagaan si anak dengan penentang kedua di rumah penentang pertama tidak menyalahi undang-undang. Memandangkan isu tunggal adalah sama ada si anak ditahan dengan menyalahi undang-undang dan, oleh kerana soalan itu telah dijawab secara negatif, maka permohonan habeas corpus tidak boleh digunakan sebagai cara menjamin penentuan kehakiman ke atas apa-apa isu kurang penting di luar tahanan menyalahi undang-undang yang dikatakan (lihat ms 542H–I dan 543A–B); *Gurdit Singh (Petitioner)* [1933] MLJ 224, *Janardan Reddy & Ors v State of*

Hyderabad & Ors [1951] SCR 344, *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & Satu lagi* [1991] 2 MLJ 244, *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793 dan *Lim Chan Seng lwn Pengarah Agama Islam Pulau Pinang & Satu lagi* [1996] 3 CLJ 231 diikut.

Obiter:

Dalam kes ini, si anak berada dalam jagaan persendirian. Dia tidak ditahan oleh pihak berkuasa statutori di bawah mana-mana statut. Oleh kerana tiada statut demikian yang terpakai, tiada isu atas kemungkiran apa-apa keperluan statutori. Berhubung dengan perintah bahawa pemohon mengatakan tidak disampaikan pada hari si anak diambil oleh penentang pertama, ini merupakan perkara undang-undang yang hanya boleh diselesaikan di bawah Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 atau kaedah-kaedah yang dibuat di bawahnya, dan bukan oleh mahkamah sivil ini (lihat ms 544B–C); *Reverend Thomas Pelham Dale* (1881) 6 QBD 376, *Re Tan Boon Liat* [1967] 2 MLJ 108, *Koh Yoke Khoon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45 dan *Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor* [1988] 2 MLJ 638 dibeza.]

Notes

For cases on the jurisdiction of the High Court, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 978–979.

For cases on the jurisdiction of the syariah court, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 384–391.

For cases on an application for habeas corpus, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 300–343.

Cases referred to

Gurdit Singh (Petitioner) [1933] MLJ 224 (folld)

Janardan Reddy & Ors v State of Hyderabad & Ors [1951] SCR 344 (folld)

Koh Yoke Khoon v Minister for Home Affairs, Malaysia & Anor [1988] 1 MLJ 45 (distd)

Lim Chan Seng lwn Pengarah Agama Islam Pulau Pinang & Satu lagi [1996] 3 CLJ 231 (folld)

Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & Satu lagi [1991] 2 MLJ 244 (folld)

Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 793 (folld)

Rama Iyer v Nataraja Iyer (1948) 40 Cr LJ 369 (refd)

Reverend Thomas Pelham Dale (1881) 6 QBD 376 (distd)

Tan Boon Liat, Re [1967] 2 MLJ 108 (distd)

Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor [1988] 2 MLJ 638 (distd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993
Criminal Procedure Code (FMS Cap 6) s 365(1)(b)
Federal Constitution art 121(1A)

Karpal Singh (*Gobind Singh Deo* with him) (*Karpal Singh & Co*) for the applicant.

Pawancheek Marican (*Wan Marican Hamzah & Shaik*) and *Zulkifli Noordin* (*Omar Affandi & Teh*) for the respondents.

Cur Adv Vult

KC Vohrah J: This is an application under s 365(1)(b) of the Criminal Procedure Code (FMS Cap 6) to the High Court for directions of the nature of habeas corpus for a child who is alleged to be illegally detained in private custody by the two respondents to be set at liberty.

It is alleged in this case that the child is in the unlawful custody of his father and his grandmother in the father's house.

The application is supported by an affidavit of the applicant who is the mother of the child and this affidavit together with another two affidavits filed within the last few days alleged certain circumstances leading to the child having been taken out of her custody into the custody of the child's father and grandmother.

The sole issue before this court is whether the child is illegally detained by the two respondents. If the detention is illegal, then the child has to be set at liberty.

In this connection, however, the respondent's two counsel have raised a preliminary objection relating to the jurisdiction of this court; they say that this court has no jurisdiction to entertain the matter. With respect, I disagree. This court has jurisdiction to entertain the habeas corpus application. This court has a duty to determine whether the detention is illegal or not, and, of course, the determination has to be in accordance with whatever is the extant law. In this case, this court is bound to take into account art 121(1A) of the Federal Constitution, case law and the provisions of the Administration of Islamic Law (Federal Territories) Act 1993 ('Act 505') in the particular circumstances of the case.

It will be noted that the first affidavit by the applicant supporting the application discloses that there is a temporary order (perintah sementara) which was made by the Syariah High Court in the Federal Territory at Kuala Lumpur in Kes Sivil/Mal Bil 92/96 on 15 August 1996. The order is to the effect, inter alia, that the child be placed under the care and control of the grandmother, the second respondent, and that the child stays with his father at a certain address until the case is disposed of.

The Syariah High Court in the Federal Territory is a creature of Act 505, it having been created under s 40 thereof. Act 505 is a federal law and

Parliament made the law obviously acting under its powers to legislate on Islamic law in the Federal Territories under art 74 read with item 6(c) of the Federal List (List I) of the Legislative Lists in the Ninth Schedule to the Federal Constitution.

The Syariah High Court is clearly therefore a court of competent jurisdiction. Ordinarily, for the purposes of a habeas corpus application, any order made by a court of competent jurisdiction is valid and subsisting until set aside under relevant laws and procedures (see *Gurdit Singh (Petitioner)* [1933] MLJ 224 and the Indian Supreme Court case *Janardan Reddy & Ors v State of Hyderabad & Ors* [1951] SCR 344).

The above aspect relating to an order of a court of competent jurisdiction has to be considered in the light of another aspect. This relates to the preliminary objection raised by the respondents having regard to art 121(1A) of the Federal Constitution. I agree with the argument that this High Court, being one of the courts referred to in cl (1) of art 121 of the Constitution, has no jurisdiction under art 121(1A) 'in respect of any matter within the jurisdiction of the syariah courts'. In other words, this civil court has no jurisdiction in matters over which the syariah court has jurisdiction. That this is the law is reflected in, and I confine myself to, the judgments of the Supreme Court in *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & Satu lagi* [1991] 2 MLJ 244 and *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793.

Is the matter of guardianship or custody of infants a matter within the jurisdiction of the Syariah High Court? Indeed so, as the Syariah High Court has jurisdiction under s 46(2)(b)(iii) of Act 505, in its civil jurisdiction, to hear and determine all actions and proceedings in which all the parties are Muslims and which relate to 'the maintenance of dependants, legitimacy, or guardianship or custody (hadanah) of infants'.

I do not think it can be argued otherwise that the order that was made by the Syariah High Court in the Federal Territory was made in respect of a matter which was well within its jurisdiction and that it is an order that affects Muslim parties. This High Court, under art 121(1A) of the Constitution, has therefore no jurisdiction to question the validity of the order which was made in respect of a matter which is obviously within the jurisdiction of the Syariah High Court.

To recapitulate, this High Court cannot, in a habeas corpus application under s 365, review or question the validity of a subsisting order made by a court of competent jurisdiction. And in any event, this court by virtue of art 121(1A) of the Constitution has no jurisdiction to question an order made in respect of a matter where the Syariah High Court, a creature of a written law, has jurisdiction given to it under a written law (see also *Lim Chan Seng lwn Pengarah Agama Islam Pulau Pinang & Satu lagi* [1996] 3 CLJ 231). This court has to accept the Syariah High Court order as a valid order. This court cannot go behind the order and consequently it has to accept that the custody of the child in the second respondent in the house of the first respondent is not illegal.

A The sole issue being whether the child is illegally detained and, that question having been answered in the negative, it has to be stated that the habeas corpus application cannot be employed as a means of securing judicial determination of any peripheral issue outside the alleged illegal detention.

B However, while En Karpal Singh conceded the effect of art 121(1A) of the Constitution, he argued that this court has to consider that the child was illegally detained on 16 August 1996 and that the order of the Syariah High Court has no effect. And he argued that one of the peripheral issues needs looking into. For completeness of this judgment, I have to consider C the argument although my view is that the argument cannot stand in the face of this court's finding that in law this court has to accept the order of the Syariah High Court as valid and subsisting and that it cannot go behind the order.

Assuming En Karpal Singh's argument can be pursued, his argument D is that the child was actually kidnapped by the first respondent (and brought into the custody of the second respondent) on 16 August and that although there was the order of the Syariah High Court made on 15 August giving custody of the child to the second respondent, the said order was not served on the applicant before the child was taken away and therefore it has no effect. He concluded that the kidnapping vitiated the order. He E was of the view that if any of the steps leading to the 'detention' (which he equated with unlawful imprisonment relying on the case of *Rama Iyer v Nataraja Iyer* (1948) 40 Cr LJ 369) of the subject was not followed, then this court must interfere. He argued that therefore the custody of the child on 16 August was not lawful. He relied on the English case of *Reverend* F *Thomas Pelham Dale* (1881) 6 QBD 376 where Brett LJ said this at p 461:

> Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another, he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the G process with extreme regularity, the court will not allow the imprisonment to continue.

Cotton LJ said this at pp 469–470:

> I quite agree with Brett LJ that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which H they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form.

These two passages were referred to with approval by Lee Hun Hoe CJ (Borneo) (as he then was) in *Re Tan Boon Liat* [1967] 2 MLJ 108 and were I relied on by Edgar Joseph Jr J (as he then was) in *Koh Yoke Khoon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45 at p 49 and *Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor* [1988] 2 MLJ 638 at p 642.

It will be noted that the English case and all the Malaysian cases which quoted the passages in the English case with approval dealt with statutory detention under statutes which prescribe requirements which have to be followed.

Here, however, the child was and is in private custody. He was and is not being detained by a statutory authority under any statute. There being no such statute involved, there is no issue of any statutory requirement having been breached. As to the effect of the order that the applicant alleged was not served on the day the child was taken away by the father or was left in the house of the applicant as alleged by the first respondent in his second affidavit, that is a matter of law that can only dealt be with under Act 505 or rules made thereunder, not by this civil court.

It will be observed that this application, carried with it its own seed of destruction from the day it was filed. The disclosure in the first supporting affidavit to the application that there is an order placing the child in the care and control of his grandmother and giving a direction that the child stays with his father — and the said order is an order that cannot be challenged in a civil court by virtue of art 121(1A) of the Constitution, it having been issued by the syariah court within its jurisdiction and therefore a valid subsisting order — destroyed the very foundation of the allegation of the child being illegally detained by the respondents. The application falls *in limine* and I dismiss the application.

Application dismissed.

Reported by Loo Lai Mee